83

(2)

No. 07-691

FILED
JAN 2 5 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

KEVIN DALE AND ABBY DALE,
INDIVIDUALLY, AND AS NEXT FRIENDS
AND NATURAL GUARDIANS OF M.D., ET AL.,

Petitioners,

v.

STEPHENS COUNTY SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

MAREN R. CAVE*
Pro Hac Vice Pending
SWIFT, CURRIE, MCGHEE & HIERS, LLP
The Peachtree, Suite 300
1355 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 874-8800

**Counsel of Record*
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Petitioners have presented any "compelling reason" for this Court to grant their Petition where the Eleventh Circuit's decision in no way conflicts with or departs from any decision of this Court or any other Circuit Court.

II. Whether a school district owes any legal duty to protect unknown students in a completely different school district by revealing unsubstantiated allegations of misconduct involving a former teacher to another school district which may hire that teacher.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASON FOR DENYING THE PETITION	9
THE ELEVENTH CIRCUIT'S HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN *DESHANEY* AND ITS PROGENY	1
THE "STATE-CREATED DANGER" THEORY CITED BY PETITIONERS DOES NOT EVEN APPLY, AND IN NO WAY JUSTIFIES GRANTING PETITIONERS' WRIT	14
PETITIONERS HAVE SET FORTH NO COMPELLING QUESTION TO BE RESOLVED BY THIS COURT WHICH HAS NOT BEEN SETTLED	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Bennett v. Philadelphia, 499 F.3d 281 (3d Cir. 2007) 17

Bright v. Westmoreland, 443 F.3d 276 (3d Cir. 2006) 18

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) ..... *passim*

Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996) 10

Doe v. Wright, 82 F.3d 265 (8th Cir. 1996) 10, 13

D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) 15, 16

Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006) 19

King v. East St. Louis School District, 496 F.3d 812 (7th Cir. 2007) 14

Koulta v. Merciez, 477 F.3d 442 (6th Cir. 2007) 10, 12, 13

Monell v. New York City Department of Social Services, 436 U.S. 658 (1984) 14

Shrum v. Kluck, 249 F.3d 773 (8th Cir. 2001) 10, 12, 136

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 16

STATUTES:

42 U.S.C. § 1983 ..... 2, 12

O.C.G.A. § 20-2-984.2 20

INTRODUCTION

This case presents the question of whether a school district can be held civilly liable for failing to pass along mere allegations of misconduct concerning a former teacher to any future or potential employers, including another school district. This is an accurate characterization of the extreme relief sought by Petitioners against the Stephens County School District ("SCSD"). The legal and practical implications of Petitioners' tenuous liability theory against SCSD is unprecedented and alarming.

Petitioners allege sexual misconduct, abuse and molestation to their minor daughters M.D. and A.C. by White County School District ("WCSD") teacher Joey Wilson during the 2003-2004 school year. Petitioners do not allege, nor have they alleged at any time, any act of molestation or abuse by a Stephens County educator in any Stephens County school, against a Stephens County student. The evidence is undisputed neither M.D. nor A.C. have ever attended school in Stephens County. Indeed, the sum and essence of Petitioners' claims against SCSD is a failure to notify WCSD of certain allegations made against Joey Wilson, which Petitioners claim would have somehow protected their students from harm at the hands of Wilson more than two years later.

Mere negligence by SCSD in failing to provide WCSD with unsubstantiated allegations regarding Joey Wilson cannot establish a cognizable constitutional violation sufficient for SCSD's liability under

42 U.S.C. § 1983. To hold otherwise would be contrary to the well-developed standards of this Court. Furthermore, it would literally open the flood gates for litigation against former employers for a "bad reference."

More importantly, Petitioners have presented no "compelling reason" for their Petition for Writ of Certiorari to be granted by this Court. *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's June 27, 2007 Order is in conflict with any decision of this Court, including *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), or any other decision from any other Circuit Court. Furthermore, Petitioners have failed to demonstrate the Eleventh Circuit decided an important federal question which has not been decided by this Court. *See* Sup. Ct. R. 10 (a)-(c). Petitioners' belief that this particular case "presents an opportunity" for this Court is *not* a sufficient basis for the grant of their Petition. The Petition should be denied.

STATEMENT OF THE CASE

Joey Wilson was hired by SCSD in 1998 to teach third grade. He taught both third and fifth grade in Stephens County, without any incident or complaint, until March of 2001. On March 9, 2001, Brenda Duffus, an elementary paraprofessional whose daughter was also a student in Mr. Wilson's fifth

grade class, approached school Principal Stan McFarlin to discuss Wilson's behavior. (McFarlin depo., R-156-17).[1] Ms. Duffus reported she had heard Mr. Wilson assisted students up on the "monkey bars" on the playground, had massaged the necks of some students while doing their work in class, and discussed with a few of his students whether they had started their menstrual cycles. (McFarlin depo., R-156-19). Mr. McFarlin asked Ms. Duffus if she would be comfortable discussing these allegations with Mr. Wilson present, and Ms. Duffus agreed. (McFarlin depo., R-156-20).

Mr. Wilson joined the two, and Ms. Duffus relayed her concerns directly to Mr. Wilson. Mr. Wilson explained his conduct was his way of encouraging his students. Mr. Wilson also mentioned the female students approached him about questions concerning their menstrual cycles after health class. (McFarlin depo., R-156-21). According to Mr. McFarlin, Ms. Duffus "felt much better" about the situation, and was "satisfied." (McFarlin depo., R-156-22). Mr. McFarlin instructed Mr. Wilson to avoid physical contact with female students, as "perception" could be interpreted as the "truth" by others. (McFarlin depo., R-156-29). Based on his discussion with Mr. Wilson and Ms. Duffus, Mr. McFarlin concluded there was

---

[1] Citations to "R" are to the record on appeal in the Eleventh Circuit.

"nothing sexual" intended by Mr. Wilson's comments or conduct. (McFarlin depo., R-156-39).

On or about March 13, 2001, Connie Worley, the school's Media Specialist, approached Mr. McFarlin concerning Mr. Wilson with Ms. Duffus. The two women reported the same complaints Ms. Duffus had relayed to Mr. McFarlin on March 9. (McFarlin depo., R-156-24; Worley depo., R-114-55). Ms. Worley later presented Mr. McFarlin with a typed list of her "concerns" which Mr. McFarlin immediately turned over to Dr. McCollum. (McFarlin depo., R-156-54). Mr. McFarlin told Ms. Worley he would speak with Mr. Wilson. Once again, Mr. McFarlin met with Mr. Wilson and reminded him of his previous request to avoid physical contact with female students, and any perception of impropriety. (McFarlin depo., R-156-58; Worley depo., R-114-59).

Later that same day, Ms. Worley approached SCSD Superintendent Patricia McCollum and reported her concerns about Joey Wilson's behavior. (McCollum depo., R-146-86). Specifically, Ms. Worley reported that several years earlier Mr. Wilson had picked her daughter up and "put her over his shoulders." (McCollum depo., R-146-86). Ms. Worley also reported Mr. Wilson had picked up another student and threw her over his shoulders, in full view of the entire elementary school, at a school "Book Week" event the previous November. (Worley depo., R-114-122). Dr. McCollum informed Ms. Worley the SCSD would conduct an investigation into Mr. Wilson's behavior. (Worley depo., R-114-73).

Prior to March of 2001, neither Dr. McCollum, Ms. Rutherford nor Mr. McFarlin had ever received any complaints of any kind of inappropriate conduct by Joey Wilson. (McCollum depo., R-146-87; Rutherford depo., R-143-58). In light of the complaints received regarding Mr. Wilson, Dr. McCollum met with Ms. Rutherford to discuss the allegations and to begin an investigation pursuant to Stephens County policy. (Rutherford depo., R-143-138; McCollum depo., R-146-90). The Stephens County School Board was also informed of the allegations. (Rutherford depo., R-143-145).

As the investigation proceeded, Ms. Rutherford sent a letter to Mr. Wilson on March 19, 2001, indicating a complaint had been made against him and an investigation would proceed. (Rutherford, depo., R-143-140). Ms. Rutherford interviewed several students, parents and teachers, obtained signed statements from most of those individuals, and made notes throughout her investigation. Stephens County also placed a paraprofessional in Mr. Wilson's classroom full time due to the "very serious investigation" regarding Mr. Wilson's conduct. (Rutherford depo., R-143-148; Worley depo., R-114-74).

Through their investigation, Dr. McCollum and Ms. Rutherford first learned of the concerns and allegations regarding Mr. Wilson. (Rutherford depo., R-143-129; McFarlin depo., R-156-65). They learned Mr. Wilson allegedly had "popped" a girl's bra. However, after Ms. Duffus spoke with the child's parent, the incident was believed to be unintentional as Mr.

Wilson attempted to lift that student up to the monkey bars, and the student's mother was "not concerned." (Rutherford depo., R-143-179). Debra Allen, another elementary school teacher in the system, reported to Ms. Rutherford during the investigation that Joey Wilson reportedly made a comment about a fifth grade girl that she would have "nice" legs on her when she grew up. (Rutherford depo., R-143-185, 222). However, as Mr. Wilson coached a traveling soccer team, this comment could be meant as an evaluation of the athletic potential of the student. (McCollum depo., R-146-181). Ms. Rutherford also learned Joey Wilson carried a female student over his shoulders "like a sack of potatoes" at the November 2000 Book Week presentation, as previously reported by Ms. Worley. (Rutherford depo., R-143-117, 122). None of these allegations had been reported to the Superintendent contemporaneously with the events.

Upon completion of the investigation, Ms. Rutherford and Dr. McCollum interviewed Mr. Wilson about the allegations. (Rutherford depo., R-143-240). Mr. Wilson provided an explanation for each of the separate complaints and allegations. Ms. Rutherford and Dr. McCollum concluded the allegations were not sexual in nature, after an examination of the context and the comment or conduct itself. (Rutherford depo., R-143-197). Even one of the initial complainants – Connie Worley – acknowledged there was no evidence Mr. Wilson's conduct amounted to sexual harassment or abuse. (Worley depo., R-114-86).

After their interview with Mr. Wilson, Dr. McCollum and Ms. Rutherford discussed the entire investigation and whether they would offer Mr. Wilson a contract for the upcoming school year. (Rutherford depo., R-143-261). Dr. McCollum concluded Mr. Wilson's conduct represented "poor judgment," but did not violate Stephens County's sexual harassment policy. (McCollum depo., R-146-186). However, they concluded Joey Wilson was "arrogant," and had committed several "stupid" acts. (McCollum depo., R-146-186). He was also unable to "get along with his fellow teachers" and exercised "poor judgment in situations." (McCollum depo., R-146-95). Therefore, Dr. McCollum presented their investigation to the Stephens County School Board on March 30, 2001, and recommended non-renewal of the teaching contract for Mr. Wilson. (McCollum depo., R-146-93; Rutherford depo., R-143-101). Stephens County offered Mr. Wilson the option of submitting his resignation instead, which he did by written letter on April 4, 2001. (McCollum depo., R-146-121). The Stephens County School District subsequently voted unanimously to accept Mr. Wilson's resignation. (McCollum depo., R-146-123). Mr. Wilson's resignation was effective at the end of the 2000-2001 school year. (McCollum depo., R-1467-125).

Several months later, Dr. Tammy Mize, the Human Resources Director of WCSD, inquired about a reference for Mr. Wilson, as the WCSD was considering hiring Mr. Wilson as a teacher. Stephens County did not have a written policy or practice as to

the "type of referral" the County would provide for a non-renewed employee in search of new employment. (McCollum depo., R-146-108). However, all employees were simply directed to tell the truth when asked about a former employee. (McCollum depo., R-146-130). Dr. McCollum and Ms. Rutherford discussed what kind of reference would be given for Mr. Wilson, and Dr. McCollum instructed Ms. Rutherford to answer the specific questions posed by WCSD. (McCollum depo., R-146-127). Dr. McCollum further advised Beth Rutherford to "tell the truth and answer" the questions by WCSD regarding Mr. Wilson, but avoid "volunteering" information amounting to speculation or unsubstantiated gossip, and to "stick to the facts." (McCollum depo., R-146-130).

Ms. Mize spoke with Ms. Rutherford by telephone on two occasions regarding Mr. Wilson's application for employment. (McCollum depo., R-143-273). During their first phone call, Ms. Rutherford asked that any request for a recommendation or reference be in writing. (McCollum depo., R-143-274). Ms. Mize informed Ms. Rutherford that White County did not "do paper references." (McCollum depo., R-143-276). However, Ms. Mize faxed several written questions to Ms. Rutherford. The questions posed by White County, according to Dr. McCollum, were "very general." (McCollum depo., R-146-128). During their second telephone conversation, Ms. Rutherford invited Ms. Mize to ask her questions about Mr. Wilson. (McCollum depo., R-143-277). Ms. Rutherford informed Ms. Mize that Mr. Wilson encountered trouble

getting along with other staff, and had an abrasive personality. (Rutherford depo., R-143-281; Mize depo., R-144-69). Ms. Rutherford also informed Ms. Mize of "swirling issues" regarding Mr. Wilson. Ms. Rutherford also explained Mr. Wilson had "good and bad" characteristics. (Rutherford depo., R-143-280; Mize depo., R-144-80). According to Ms. Rutherford, Ms. Mize never asked if Mr. Wilson had been recommended for non-renewal with Stephens County, and Ms. Rutherford did not offer that information. (Rutherford depo., R-143-283). However, Ms. Rutherford believed she did not leave Ms. Mize with a "good feeling" regarding Mr. Wilson. (Rutherford depo., R-143-296). Dr. Mize also spoke with Mr. McFarlin concerning Mr. Wilson's employment in Stephens County. When contacted by Ms. Mize and asked why he was not returning to Liberty Elementary, Mr. McFarlin stated Mr. Wilson had "issues" at the school, some of which included staff. (McFarlin depo., R-156-82; Mize depo., R-144-101).

Joey Wilson was ultimately offered a position teaching in White County. Petitioners claim Joey Wilson sexually abused and molested their minor student children, A.C. and M.D., three years later during the WCSD 2003-2004 school year.

REASONS FOR DENYING THE PETITION

Petitioners submit two novel "reasons" for the grant of their writ of certiorari: an "opportunity" for

this Court to resolve a perceived "split" among the Circuit Courts regarding the "state-created danger" theory from *DeShaney*, and to address an "important" question involving the safety of children. (Petition, pp. 10, 15). Neither reason justifies the grant of the Petition whatsoever.

First, the decision of the Eleventh Circuit is simply not in conflict with any decision by this Court or any other Circuit Court. The Eleventh Circuit's reasoning and holding clearly follows this Court's decision in *DeShaney*. Furthermore, it follows factually similar cases decided by the Sixth Circuit in *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) and the Eighth Circuit in *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001) and *Doe v. Wright,* 82 F.3d 265 (8th Cir. 1996). There is no "conflict" between this Court and the various Circuit Courts which were presented with similar situations. Each of those three decisions relied upon this Court's reasoning and holding in *DeShaney*.

Second, in an effort to find some "conflict," Petitioners raise, *for the very first time*, the possibility the "state-created danger" theory may apply. Specifically, a perceived "conflict" among the Circuits somehow justifies their Petition. This Court should look past this effort on the part of Petitioners. The "state-created danger" theory is simply inapplicable, and certainly does not justify the Petition. Finally, while SCSD agrees the protection of children from any sexual abuse is indeed important, this reason alone is

not sufficiently "compelling" to warrant this Court's review of this case under Sup. Ct. R. 10.

I. THE ELEVENTH CIRCUIT'S HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN *DESHANEY* AND ITS PROGENY

The decision by the Eleventh Circuit follows this Court's difficult but clear decision in *DeShaney*, where this Court refused to impose liability on the Winnebago County Department of Social Services for failing to remove a minor child from his father's custody, despite knowledge by the Department of previous abuse to the child. This Court held the Department "had no constitutional duty" to protect the child, because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by *private actors*." 489 U.S. at 196, 201 (emphasis added). This Court further rejected DeShaney's claim the Department had a "special relationship" with the child which imposed an affirmative duty to provide him adequate protection simply because it "knew" the child faced "a special danger of abuse at his father's hands." *Id.* at 197. Instead, this Court reasoned while the Department "may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. This Court ultimately determined the Department's failure to protect the child, "though calamitous in hindsight,"

did not constitute a violation of the Due Process Clause. *Id.* at 202.

Under *DeShaney*, liability cannot be imposed on a state's mere knowledge of an "individual's predicament or from its expressions of intent to help him." *Id.* at 200. The essence of Petitioners' claim is SCSD had specific information and knowledge about allegations of misconduct concerning Joey Wilson, yet did nothing to alert his potential employer, WCSD. Petitioners' claims undoubtedly fail under *DeShaney*. SCSD had no ability to control Joey Wilson's conduct, either at WCSD or elsewhere. He was a "private actor" once he left his employment at SCSD. Furthermore, SCSD had no affirmative duty to warn WCSD or other potential employers given the knowledge and information it had from those reports of misconduct concerning Joey Wilson – *DeShaney* expressly rejected any such an affirmative duty. The Eleventh Circuit's determination SCSD could not be liable for the actions of those "whom the local government has no authority to control" follows *DeShaney* and its progeny, and was appropriate.

Interestingly, Petitioners continuously fail to mention or discuss two factually applicable decisions from the Eighth Circuit, which were cited by the Eleventh Circuit in its Order, and apply the reasoning of *DeShaney*. In *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2000), the Eighth Circuit refused to impose § 1983 liability against a school district and its superintendent after presenting a neutral letter of recommendation to another school district regarding a

former teacher who allegedly touched students and made inappropriate comments. Just as WCSD claims in this case, the subsequent school district which hired the teacher claimed it would not have hired him "if it had known about his prior misconduct." 249 F.3d at 776. Citing *DeShaney*, the Eighth Circuit concluded the original school district could not be held responsible for "failing to warn other potential employers of Kluck's suspected misconduct because the Due Process Clause does not obligate the state to protect an individual against private violence." *Id.* at 781. Additionally, in *Doe v. Wright,* 82 F.3d 265 (8th Cir. 1996), the chief of police of Helena provided a favorable recommendation to Pulaski, a neighboring police department, regarding Wright, a former Helena officer. Wright received complaints of sexual misconduct during his employment in Helena. Pulaski sought a recommendation from the Helena chief, who provided a favorable recommendation and did not disclose the previous complaints against Wright. Wright subsequently committed sexual acts while employed by Pulaski. The Eighth Circuit declined to impose liability against the Helena police chief, as he was not aware the plaintiffs in Pulaski County "faced any special danger, as distinguished from the public at large." *Id.* at 268. Furthermore, following *DeShaney*, the Eighth Circuit concluded the Due Process Clause did not require the Helena police chief to "protect" and warn against potential deeds committed by Wright, a "private actor," in another police department. *Id.* at 269. The *Shrum* and *Doe*

decisions are factually on point, and appropriately applied *DeShaney*.

Petitioners continue to miss the point regarding the "moving force" behind their students' constitutional deprivations. Undoubtedly, their claims are directly attributed to Joey Wilson, and Joey Wilson only. A school district is only liable under § 1983 if the school district itself is culpable. Congress did not intend to impose liability on a municipality unless deliberate action attributed to the municipality itself is the "moving force" behind a plaintiff's deprivation of protected rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1984). Following the principles established in *Monell* and *DeShaney,* the Eleventh Circuit correctly held that "local governments can never be liable under Section 1983 for the acts of those whom the local government has no authority to control." (App. 3). Petitioners have failed to alert this Court of any conflicting decisions of this Court, or any decisions in conflict with or in departure from this well known and recognized standard.

II. THE "STATE-CREATED DANGER" THEORY CITED BY PETITIONERS DOES NOT EVEN APPLY, AND IN NO WAY JUSTIFIES GRANTING PETITIONERS' WRIT.

Petitioners discuss at length the "state-created danger" exception to *DeShaney* as a "reason" for granting their Petition. Petitioners claim the differing

variations on this theory – which is not recognized by this Court, and was not mentioned or even discussed by the Eleventh Circuit in its Order – somehow justifies their Petition *in this case*. The "state-created danger" theory is simply inapplicable. Furthermore, Petitioners' interpretation of the theory is certainly not an appropriate vehicle for this Court to grant their Petition under Sup. Ct. R. 10.

The "state-created danger" theory stems from this Court's discussion in *DeShaney* whereby some Circuit Courts have imposed liability against a state actor in extreme situations if the state actor "created the danger" or rendered an individual "more vulnerable" to harm. Petitioners acknowledge the Eleventh Circuit never even mentioned or discussed the theory in its Order; nonetheless, they claim the Eleventh Circuit "rejects" the theory in principle, and its decision was "squarely at odds" with other Circuits who have allowed for such liability "under similar circumstances." (Petition, p. 15). Perhaps Petitioners have not thoroughly examined the decisions of those Circuits which have recognized the "state-created danger" theory – many of the decisions from those Circuits have refused to impose such liability in educational settings.

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992), the Third Circuit – which recognizes the theory – refused to impose liability against a high school teacher after male students sexually molested female students in her classroom. The female students claimed the

school's failure to report, investigate and stop the physical and sexual misconduct in the classroom "imperiled" them and "increased their risk of harm." *Id.* at 1373. However, the Third Circuit determined the only "recognized risk" was a lack of education; instead, the students' real harm came about "solely through the acts of private persons without the level of intermingling of state conduct with private violence" which supported liability in other cases. *Id.* at 1375. One of the cases examined and distinguished by the Third Circuit in *Middle Bucks* – and cited twice by the Petitioners – was *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). *Wood* involved a police officer who arrested an intoxicated driver and impounded the vehicle, but left the intoxicated driver's female passenger in a neighborhood known for criminal activity at night without any means to travel. The woman was raped by a stranger who offered to take her home. The *Middle Bucks* Court distinguished *Wood* because the victim was known by the officers, and the officer "affirmatively acted *to create the danger to the victims*." *Middle Bucks*, 972 F.2d at 1374 (emphasis added). In *King v. East St. Louis School District*, 496 F.3d 812 (7th Cir. 2007), the Seventh Circuit recently affirmed summary judgment to a school district for a claim made under the "state-created danger" theory.[2]

---

[2] As described in *King*, the Seventh Circuit's test for the "state-created danger" theory is "(1) the state, by its affirmative acts, must create or increase a danger faced by an individual; (2) the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the

(Continued on following page)

The student met with a school counselor at the end of a school day and missed the school bus. She exited the school building and tried to reenter to make a telephone call, but a hall monitor denied her reentry. The student was abducted and raped while walking to a public transportation station. The Seventh Circuit found no liability under the "state-created danger" theory, as the evidence revealed "simple negligence in failing to account for all circumstances that may arise in which a student would seek to reenter the school." *Id.* at 819.

Here, there is absolutely no evidence whatsoever SCSD "created" any inclination or desire on the part of Joey Wilson to assault M.D. and A.C. in an entirely different school district. Even decisions from the Circuits which recognize this exception require a state actor "create" the harm alleged. The Third Circuit requires proof of "affirmative acts" that are the "but for cause" of the risks ultimately faced by an injured party. *Bennett v. Philadelphia,* 499 F.3d 281, 288 (3d Cir. 2007).

Furthermore, the ultimate acts of sexual abuse purportedly committed by Joey Wilson to A.C. and M.D. in WCSD two years later were hardly foreseeable to SCSD. Under the Third Circuit's four part

---

individual; and (3) because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience." *King*, 496 F.3d at 817-818.

"state-created danger" test, a plaintiff must prove the harm "ultimately caused was foreseeable and fairly direct," and a "relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts." *Bright v. Westmoreland*, 443 F.3d 276, 281 (3d Cir. 2006). SCSD learned of inappropriate comments about menstruation, incidental touching of a girl's back while raising her up on the monkey bars on the playground, throwing a girl over his shoulders at a book club event in front of the entire school, and making a comment about a soccer player's legs. These specific comments in no way translated into a suggestion or possibility that Joey Wilson would sexually assault students in another school district, as M.D. and A.C. have so alleged. *Assuming* SCSD had some legal obligation to reveal these prior allegations of misconduct, the information conceivably passed along to WCSD would have never alerted WCSD to the possibility Joey Wilson would touch and massage the breasts and buttocks of M.D. and A.C. – which is precisely what they have alleged.

Finally, the evidence reveals SCSD did not do anything to render A.C. and M.D. any more vulnerable to harm, as opposed to any other student in the WCSD, any resident of White County, or any person living in the State of Georgia. Even the Circuits which utilize the "state-created danger" theory require a plaintiff to demonstrate a specific victim, as opposed to the public at large. For example, under the Sixth Circuit's "state-created danger" theory, there

must be evidence the state's actions placed the "plaintiff specifically at risk, as distinguished from a risk that affects the public at large." *Koulta v. Merciez*, 477 F.3d 442, 445 (6th Cir. 2007) (*quoting Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006). Petitioners have never come forth with any evidence SCSD made A.C. and M.D. "more vulnerable" to harm beyond the girls on the soccer team Joey Wilson coached, the children who attended his church, or the young girls who may have lived down the street. While SCSD knew Joey Wilson had at least applied at WCSD, there is no evidence it knew the position, particular school or particular students with whom Mr. Wilson would come into contact. Joey Wilson may have easily been interviewing at numerous school districts throughout the State of Georgia or elsewhere. Was SCSD under an obligation to alert every school district in the State, and perhaps beyond the State of Georgia, that Mr. Wilson was a potential sexual predator based on complaints made to SCSD which were investigated and determined not to be sexual or abusive in any way? *DeShaney* does not mandate any such duty, nor does common sense. The "state-created danger" theory is simply not applicable to this case. Petitioners' exhaustive discussion about a purported "split" between the Eleventh Circuit and other Circuits as an "opportunity" for this Court is unnecessary and inappropriate under Sup. Ct. R. 10. The Petition should be denied.

III. PETITIONERS HAVE SET FORTH NO COMPELLING QUESTION TO BE RESOLVED BY THIS COURT WHICH HAS NOT BEEN SETTLED.

SCSD's very existence is to educate, nurture and protect children. SCSD agrees with Petitioners' statement this Country has an important interest in protecting children. However, Petitioners' use of what amounts to a *cliché* as a legal justification for this Court's review of this case is transparent at best.

Petitioners claim the "facts of this case are extreme." (Petition, p. 17). The facts of *DeShaney* were both egregious and extreme, but this Court refused to impose § 1983 liability against the Winnebago Department of Social Services. Imposing liability against a former employer for not revealing investigations or complaints made against a former employee is even more extreme. An employer – whether it be a school district or private industry – has an interest in conducting investigations into allegations of abuse and wrongdoing. If substantiated, certain legal reporting requirements may warrant disclosure.[3] If

---

[3] O.C.G.A. § 20-2-984.2(b) requires certain school officials to report a matter to a local school board if it has a "good faith, reasonable basis" or "evidence" that one of six crimes identified in § 20-2-984.2(a)(1) through (6) was "committed." Any allegations of sexual abuse, molestation or harassment against Mr. Wilson were never substantiated, nor rose to the level or type of conduct required for a report to the PSC for its investigation. The District Court correctly held § 20-2-984.2(b) did not require educators to report "mere allegations of child abuse" but instead

(Continued on following page)

unsubstantiated, both the former employee and the former employer have an interest in the non-disclosure of such information. A teacher has an interest in avoiding unsubstantiated rumor or circulated innuendo. Employers have an interest in sticking to "the facts," instead of spreading rumor, in order to minimize any potential for slander and libel liability. More importantly, a hiring school district has little interest in hearing of unsubstantiated allegations because they are simply not sufficiently probative of a teacher's likelihood of harming any students in the future. Nonetheless, Petitioners claim SCSD should have informed WCSD of Joey Wilson's "history of sexual misconduct." (Petition, p. 19). The "passing" of such information would have undoubtedly exposed SCSD to defamation liability from Wilson, as such reports would have been false. Even one of Joey Wilson's initial complainants – Connie Worley – acknowledged there was no evidence Mr. Wilson's conduct even amounted to sexual harassment or abuse. (Worley depo., R-114-86). The suggestion by Petitioners that SCSD had a constitutional obligation to reveal unsubstantiated allegations of misconduct to a former teacher's potential employer is "extreme." No precedent of this Court, the Eleventh Circuit, or any other Circuit requires a school district to disclose mere allegations of misconduct, particularly when

---

"*breaches* of the Code" to the PSC once they "have clearly established that a breach occurred." (App. 31, n. 7, emphasis in original).

they were investigated and found to be without merit. To hold otherwise would open the door for liability against previous employers for inaccurate or incorrect "references." Accordingly, this case does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, Respondents ask this Court to deny the Petition for the Writ of Certiorari.

Respectfully submitted,

MAREN R. CAVE*
Pro Hac Vice Pending
SWIFT, CURRIE, MCGHEE & HIERS, LLP
The Peachtree, Suite 300
1355 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 874-8800

**Counsel of Record*
Counsel for Respondent